

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

1 SERGIO OCTAVIO PENA,

2 Petitioner, No. C 07-2119 PJH

3 v.

**STAY ORDER;
ADMINISTRATIVE CLOSURE**

4 JAMES E. TILTON,

5 Respondent.
6 /7 On April 16, 2007, petitioner Sergio Pena ("Pena"), a California prisoner who is
8 currently incarcerated, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. §
9 2254.**BACKGROUND**10 In 2003, a San Mateo County jury convicted Pena of second degree murder. The
11 trial court sentenced Pena to sixteen years to life in prison. Petitioner unsuccessfully
12 appealed his conviction to the California Court of Appeal, and the California Supreme Court
13 thereafter denied review on January 18, 2006. Pena subsequently filed a habeas petition
14 in the state superior court on April 16, 2007, the same day that he filed the petition with this
15 court. Petitioner asks the court to stay the instant case pending exhaustion of his state
16 habeas petition.**DISCUSSION**

17 A. Habeas Standard

18 This court may entertain a petition for a writ of habeas corpus "in behalf of a person
19 in custody pursuant to the judgment of a State court only on the ground that he is in
20 custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §
21 2254(a). It shall "award the writ or issue an order directing the respondent to show cause
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1 why the writ should not be granted, unless it appears from the application that the applicant
2 or person detained is not entitled thereto.” *Id.* at § 2243.

3 || B. Legal Claims

4 As grounds for federal habeas relief, Pena asserts that his Due Process rights were
5 violated when the trial court admitted gang evidence against him. The claim is cognizable,
6 but it is at least in part unexhausted. As noted, Pena asks that the case be stayed pending
7 exhaustion, and notes that he is presently pursuing the unexhausted claims in the state
8 court system.

9 District courts have the authority to stay mixed petitions to allow for exhaustion. See
10 *Rhines v. Webber*, 544 U.S. 269, 274-75 (2005). However, such stays can only be granted
11 upon a showing of good cause for petitioner's failure to exhaust the issues before filing the
12 federal petition, and a showing that the issues which the petitioner proposes to exhaust are
13 "potentially meritorious." *Id.*

With respect to good cause, Pena correctly notes that once he has exhausted his claim in state court, the window in which he has to file his federal petition is extremely narrow – two days – and that absent a stay, any small delay in notification to petitioner may result in the forfeiture of his rights under AEDPA. These allegations are sufficient to support a stay in this case. Moreover, Pena’s petition is “potentially meritorious,” in that it presents a colorable federal claim.

20 | Accordingly, the stay will be granted.

CONCLUSION

22 For the foregoing reasons, petitioner's request for a stay is GRANTED, and the case
23 is hereby STAYED to allow petitioner to present his unexhausted claim(s) in state court. If
24 petitioner is not granted relief in state court, he may return to this court and ask that the
25 stay be lifted. The stay is subject to the following condition:

- 26 1. Petitioner must notify this court within thirty days after the state courts have
27 completed their review of his claims or after they have refused review of his

1 claims.

2 If this condition of the stay is not satisfied, this court may vacate the stay and act on
3 this petition. See *Rhines*, 125 S. Ct. at 1535 (district court must effectuate timeliness
4 concerns of AEDPA by placing “reasonable limits on a petitioner’s trip to state court and
5 back”).

6 Additionally, at the same time that he files his notification with this court regarding
7 exhaustion, petitioner is hereby ORDERED to file and serve a supplemental brief in
8 support of his petition for federal habeas relief that delineates the *specific* gang-related
9 evidence that he contends violated his Due Process rights. In the instant petition filed with
10 this court, petitioner has discussed a number of categories of gang-related evidence, but
11 has not addressed specifically which evidence forms the basis for his claim. In the
12 supplemental brief, petitioner should delineate the specific evidence and explain why the
13 trial court’s admission of that evidence violated his constitutional rights.

14 The clerk shall administratively close this case. The closure has no legal effect; it is
15 purely a statistical matter. The case will be reopened, the stay vacated, and an order to
16 show cause issued upon notification by petitioner in accordance with the conditions set
17 forth above.

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19 **IT IS SO ORDERED.**

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21 Dated: April 23, 2007



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23 PHYLIS J. HAMILTON
24 United States District Judge

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